

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RUSSELL H. FRYE,) Case No. 06-5399 SC
)
Plaintiff,) ORDER DENYING
) DEFENDANTS' MOTION TO
v.) STRIKE PLAINTIFF'S
) EXPERT WITNESS
THE WINE LIBRARY, INC., a) DISCLOSURE; GRANTING
California Corporation; EDWARD) IN PART AND DENYING
GELSMAN, an individual; and CARL) IN PART DEFENDANTS'
GELSMAN, an individual,) MOTION FOR SUMMARY
) JUDGMENT; DENYING
Defendants.) PLAINTIFF'S MOTION
) FOR LEAVE TO AMEND
) COMPLAINT; AND
) DENYING PLAINTIFF'S
) MOTION TO MODIFY
) CURRENT SCHEDULE

I. INTRODUCTION

This matter comes before the Court on the Motion to Strike Plaintiff's Expert Witness Disclosure ("Motion to Strike") and the Motion for Summary Judgment filed by the defendants The Wine Library, Inc. ("TWL"), Edward Gelsman, and Carl Gelsman (collectively "Defendants"), as well as the Motion for Leave to Amend Complaint ("Motion for Leave") and the Motion to Modify Current Schedule ("Motion to Modify") filed by plaintiff Russell Frye ("Plaintiff" or "Frye"). See Docket Nos. 36, 28, 29, 32. The parties filed Oppositions and Replies to all four motions. See Docket Nos. 38, 40, 42 45, 46, 49, 56, 59. For the following reasons, the Court DENIES Defendants' Motion to Strike; GRANTS IN PART and DENIES IN PART Defendants' Motion for Summary Judgment; DENIES Plaintiff's Motion for Leave; and DENIES Plaintiff's Motion

1 to Modify.

2
3 **II. BACKGROUND**

4 The following facts are not disputed unless otherwise noted.
5 Plaintiff is an avid collector of fine wines. Seeking to add to
6 his collection, Plaintiff was informed by several friends that
7 Defendants, as purveyors of fine wines, would likely be able to
8 sell Plaintiff additional rare bottles. Compl. ¶ 1. Defendant
9 TWL is a fine-wine retailer. Mot. for Summ. J. at 2. Defendant
10 Edward Gelsman owns TWL and his brother, Carl Gelsman, is a full-
11 time employee. Id. Casey Decl. Ex. C. E. Gelsman Dep. at 72, 86.
12 Between June 2000 and February 2003 Plaintiff purchased between 53
13 and 60 bottles of fine wines at an aggregate purchase price
14 Plaintiff estimates to be \$565,000.¹ Compl. ¶ 11. Over this
15 period, Defendants kept Plaintiff's credit card information and
16 signature on file and, as Plaintiff would call in or fax orders
17 for wine, Defendants would charge Plaintiff's credit card. Opp'n
18 to Summ. J. at 14. Defendants would often hold the bottles that
19 Plaintiff had purchased at TWL's facilities until Plaintiff
20 arranged for refrigerated transportation to his storage facility.
21 Mot. for Summ. J. at 2; Opp'n to Summ. J. at 13-14. The first
22 shipment of bottles occurred on May 18, 2001, and included nine of
23 the bottles at issue. Mot. for Summ. J. at 2; Casey Decl. ¶ 6,

24
25

¹ In his Complaint Plaintiff states that he purchased "53 or
26 more bottles of wine" Compl. ¶ 11. In his Opposition to
27 Summary Judgment, Plaintiff states "TWL sold Plaintiff Russell Frye
28 60 bottles" Opp'n to Summ. J. at 1. This apparent
discrepancy is not relevant to the issues now before the Court.

1 Ex. D. In April 2002 the next shipment of 30 bottles was sent to
2 Plaintiff. Id. ¶ 7. Seven more of the bottles were shipped in
3 December 2002. Id. ¶ 8. The parties' records do not reflect when
4 the remaining bottles were shipped.² Id. ¶ 9.

5 By December 2005, Plaintiff had amassed a collection of
6 approximately 10,000 bottles of fine wines. Compl. ¶ 12.
7 Plaintiff then decided to sell a substantial portion of his
8 collection at auction. Id. In preparation for auction,
9 representatives of the auctioneer Sotheby's inspected the wines
10 that Plaintiff intended to auction. Id. After inspecting the
11 wines, the Sotheby's representatives advised Plaintiff that
12 Sotheby's was unwilling to auction various bottles of Plaintiff's
13 wine, including but not limited to most of the bottles Plaintiff
14 had purchased from Defendants. Id. ¶ 13; Mot. for Summ. J. at 3.
15 According to Sotheby's representatives, Sotheby's was unwilling to
16 auction these wines because of questions regarding the wine's
17 authenticity. Compl. ¶ 14; Mot. for Summ. J. at 3. In June 2006,
18 Plaintiff hired his own wine expert who concluded that 34 of the
19 bottles purchased from Defendants were counterfeit and 12 of the
20 bottles purchased from Defendants were suspect. Compl. ¶ 4.

21 On August 31, 2006, Plaintiff filed his Complaint, alleging
22 the following causes of action: (1) fraud; (2) constructive fraud;
23 (3) negligent misrepresentation; (4) unlawful business practices;

24
25 ² Although Defendants' counsel William Casey states in his
26 declaration that "[t]he records produced in this action do not
27 reflect the date(s) of delivery for the following seven bottles . .
28 .," Casey Decl. ¶ 9, the list of wine that appears directly below
this statement contains eight, not seven bottles. This discrepancy
is also of no significance to the matters at hand.

(5) fraudulent business practices; (6) breach of contract; and (7) breach of warranty. Trial is scheduled to begin January 14, 2008. See Civil Minutes, Docket No. 26.

III. DISCUSSION

A. Motion to Strike Plaintiff's Expert Witness

October 30, 2007, was the deadline for expert disclosures, pursuant to Federal Rule of Civil Procedure 26. See Mot. to Strike at 2. Defendants complied with the deadline and served Plaintiff with two expert reports. Defendant received no expert disclosures from Plaintiff and, on November 2, filed a Motion for Summary Judgment. Plaintiff then served Defendants with a Rule 26 Expert Disclosure and Expert Report on November 8, which identified Michael Egan as Plaintiff's expert and provided several of his reports. Id. at 3. Defendants now seek to have Plaintiff's Expert Report and Disclosure stricken, thereby precluding Plaintiff from using it at summary judgment and/or trial.

Federal Rule of Civil Procedure 37(c)(1) provides, in relevant part:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.
Fed. R. Civ. P. 37(c)(1).

Defendants argue that the late disclosure was not harmless because Defendants relied in their summary judgment motion on

1 Plaintiff's failure to proffer any evidence regarding the
2 authenticity of the wine. Although Defendants did make such an
3 argument in support of summary judgment, this argument was one of
4 approximately five distinct theories for summary judgment. More
5 importantly, Defendants have known that Plaintiff was relying on
6 Mr. Egan and his reports since at least November 2, 2006, when
7 Plaintiff's attorney sent Defendants a letter stating, in part:

8 I also wanted to provide you with
9 additional information regarding
10 Plaintiff's experts in this case. As we
11 have discussed both in our call and on
12 many occasions previously, Michael Egan
13 will be acting as Plaintiff's principal
14 authenticity expert in this matter. We
15 have already produced his reports and
16 work in this case I am also,
17 however, including an additional copy of
18 these materials with this letter so that
19 you have a copy of the relevant reports
20 pursuant to Federal Rule of Civil
21 Procedure 26(a)(2)(B).

22 Dunlap Decl. in Support of Opp'n to Summ. J. Ex. P. Defendants'
23 argument that Plaintiff's late disclosure was not harmless is
24 clearly contradicted by this letter. Not only were Defendants on
25 notice of Mr. Egan's involvement with the case as Plaintiff's
26 expert, but they also had numerous copies of his reports
27 approximately a year before filing the present Motion to Strike.

28 Finally, Defendants' own Reply brief in this matter undercuts
their position that Plaintiff's late disclosure was not harmless.
Defendants state: "Mr. Egan's opinions are considered by the
defense to be incomplete, lacking in foundation, speculative,
biased and generally of minimal relevance to the issues in this
case." Reply at 2 n.1. Thus, according to Defendants, Mr. Egan's
participation in the case is hardly consequential. For these

1 reasons, the Court DENIES Defendants' Motion to Strike Plaintiff's
2 Expert Witness Disclosure.

3 **B. Defendants' Motion for Summary Judgment**

4 Entry of summary judgment is proper "if the pleadings, the
5 discovery and disclosure materials on file, and any affidavits,
6 show that there is no genuine issue as to any material fact and
7 that the movant is entitled to judgment as a matter of law." Fed.
8 R. Civ. P. 56(c). "Summary judgment should be granted where the
9 evidence is such that it would require a directed verdict for the
10 moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250
11 (1986). Thus, "Rule 56(c) mandates the entry of summary judgment
12 . . . against a party who fails to make a showing sufficient to
13 establish the existence of an element essential to that party's
14 case, and on which that party will bear the burden of proof at
15 trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In
16 addition, entry of summary judgment in a party's favor is
17 appropriate when there are no material issues of fact as to the
18 essential elements of the party's claim. Anderson, 477 U.S. at
19 247-49. The Court addresses each of Defendants' arguments for
20 summary judgment in turn.

21 **1. Fraud**

22 Defendants argue that summary judgment is appropriate on
23 Plaintiff's first cause of action for fraud because Plaintiff "has
24 adduced no evidence that TWL knew the falsity of [its]
25 representations or intended to deceive Frye." Mot. at 4.
26 According to Defendants, none of the evidence put forward by
27 Plaintiff indicates that "TWL knowingly misrepresented the
28

1 authenticity of the wines it was selling with the intent to
2 deceive Frye." Id.

3 Plaintiff has presented evidence indicating that Defendants
4 told Plaintiff that Defendants had personal knowledge of both the
5 quality of wine and the origins of the wine when, in fact,
6 Defendants did not. For example, in his deposition, Edward
7 Gelsman concedes that although he told Plaintiff that certain of
8 the bottles were in fact in "mint condition," Gelsman had not seen
9 the bottles, had no firsthand knowledge of whether this statement
10 was true, and instead was merely repeating what a third party had
11 told him. See Dunlap Decl. Ex. A Excerpts of E. Gelsman Dep. at
12 199-200. In another example, Edward Gelsman communicated to
13 Plaintiff that he could secure for Plaintiff wine from "one of the
14 world's greatest collection with the best provenance and condition
15 I have ever seen in all my years in the wine business." Id. at
16 216. During questioning at the deposition, however, Edward
17 Gelsman conceded that this statement was based on Gelsman's
18 "speculation . . . that I previously sold wines from this
19 collection and that these wines which were up for sale now were
20 identified to me as being from the same collection that I
21 previously sold wines from and had wines delivered to me and had
22 delivered to my clients." Id. at 218. Gelsman conceded that he
23 had not "seen the collection" but had rather "seen some bottles
24 that had come out of the collection" Id. at 218-19. This
25 evidence is sufficient to convince the Court that triable issues
26 of material fact exist regarding Defendants' knowledge of the
27 falsity of their representations and intention to deceive
28

1 Plaintiff. Defendants' Motion for Summary Judgment on Plaintiff's
2 fraud claim is DENIED.

3 2. Constructive Fraud

4 Defendants argue that Plaintiff's claim for constructive
5 fraud fails as a matter of law because Plaintiff cannot establish,
6 as he must under a constructive fraud claim, that there existed a
7 confidential relationship between the parties.³ "Constructive
8 fraud is a unique species of fraud applicable only to a fiduciary
9 relationship or confidential relationship." Dealertrack, Inc. v.
10 Huber, 460 F. Supp. 2d 1177, 1183 (C.D. Cal. 2006) (internal
11 quotation marks omitted).

12 Plaintiff argues that because Defendants held themselves out
13 to Plaintiff as wine experts and because Plaintiff relied
14 completely on Defendants' opinion when purchasing wines, often
15 purchasing the wines without ever having seen the actual bottles,
16 a confidential relationship existed. "A confidential relationship
17 exists when one party gains the confidence of the other and
18 purports to act or advise with the other's interest in mind."
19 Younan v. Equifax Inc., 111 Cal. App. 3d 498, 517 n.15 (Ct. App.
20 1980). "The existence of a confidential relationship is generally
21 a question of fact." Tyler v. Children's Home Soc'y, 29 Cal. App.
22 4th 511, 549 (Ct. App. 1994). The Court finds that there are
23 triable issues of material fact regarding whether a confidential
24

25 ³ Although Defendants also argue that Plaintiff has failed to
26 demonstrate a fiduciary relationship, Plaintiff's claim for
27 constructive fraud only alleges the existence of a confidential
28 relationship. See Compl. ¶ 88. The Court therefore only addresses
the issue of whether a confidential relationship existed.

relationship existed between Plaintiff and Defendants.
 Defendants' Motion for Summary Judgment on this claim is DENIED.

3. Statutes of Limitations

Defendants argue that various statutes of limitations preclude Plaintiff from bringing various claims with respect to 39 of the bottles at issue. Each of the statutes of limitations asserted by Defendants is four years. Plaintiff does not dispute that 39 of the bottles were purchased by and delivered to Plaintiff before August 31, 2002.⁴ Instead, Plaintiff argues that because he did not discover that the bottles were allegedly counterfeit until December 2005 and February and March 2006, when the bottles were inspected by Sotheby's in anticipation of a wine auction, all applicable statutes of limitations should be tolled. The Court addresses the parties' arguments in turn.

a. California Commercial Code Section 2725

Defendants argue that Plaintiff's breach of contract, breach of implied warranty and negligent misrepresentation claims with respect to the 39 bottles are barred by section 2725. Section 2725 states, in pertinent part:

- (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . .
- (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made
- (4) This section does not alter the law on tolling of the statute of limitations

⁴ Plaintiff filed his Complaint on August 31, 2006.

1 Cal. Com. Code § 2725.

2 Plaintiff argues that the delayed discovery doctrine is
3 applicable to his claims and section 2725 therefore does not
4 preclude his action. The delayed discovery rule "may be applied
5 to breaches which can be, and are, committed in secret and,
6 moreover, where the harm flowing from those breaches will not be
7 reasonably discoverable by plaintiffs until a future time." April
8 Enters. v. KTTV & Metromedia, Inc., 147 Cal. App. 3d 805, 832 (Ct.
9 App. 1983). "The discovery rule protects those who are ignorant
10 of their cause of action through no fault of their own." Id.

11 Although section 2725 clearly permits tolling of the statute
12 of limitations, it is equally clear that delayed accrual is not
13 permitted. The delayed discovery rule is exactly that--delayed
14 accrual. See April Enters., 147 Cal. App. at 832 (stating that
15 the delayed discovery doctrine "permits delayed accrual until a
16 plaintiff knew or should have known of the wrongful conduct at
17 issue"). Thus, tolling of the four year statute of limitations
18 would be permitted under section 2725 if, for example, there were
19 some intervening act after the limitations period began accruing
20 that prevented Plaintiff from filing his claim. See Cal. Com.
21 Code § 2725(2). Section 2725, by its very language, however,
22 prohibits the type of delayed accrual on which Plaintiff bases his
23 delayed discovery argument. The authority cited by Plaintiff is
24 inapposite as none of the cases involve section 2725. For these
25 reasons, Plaintiff's breach of contract claim may only be asserted
26 for those bottles of wine purchased less than four years before
27 Plaintiff filed his Complaint, or, in other words, purchased after

1 August 31, 2002. Defendants' Motion for Summary Judgment on this
2 issue is GRANTED.

3 Defendants also argue that Plaintiff's breach of implied
4 warranty claim is time-barred by section 2725. "Section 2725 of
5 the California Uniform Commercial Code provides that an action for
6 breach of warranty accrues on tender of delivery. Krieger v. Nick
7 Alexander Imports, Inc., 234 Cal. App. 3d 205, 215 (Ct. App.
8 1991). "An exception is made where a warranty 'explicitly extends
9 to future performance of the goods and discovery of the breach
10 must await the time of such performance.'" Id. (quoting Cal. Com.
11 Code § 2725(2)). Defendants assume, and Plaintiff does not
12 contest, that section 2725 applies to implied warranties in
13 addition to express warranties.

14 "A defendant who moves for summary judgment bears the burden
15 of negating the applicability of the discovery exception for
16 accrual of an action on a future warranty." Kreiger, 234 Cal.
17 App. at 216. The issue before the Court, then, is whether the
18 implied warranty "explicitly extend[ed] to future performance of
19 the goods" Cal. Com. Code § 2725(2). It would be a
20 difficult stretch to find than anything 'implied' contained any
21 'explicit' provisions. Therefore, by the plain meaning of the
22 language, the Court is bound to conclude that the implied warranty
23 did not contain an explicit extension to future performance.
24 Section 2725's exception to a claim for breach of warranty
25 accruing at the time the breach was discovered is therefore not
26 applicable and Plaintiff's breach of implied warranty claim is
27 also barred as to the bottles purchased prior to August 31, 2002.

1 Defendants' Motion for Summary Judgment is GRANTED on this issue.

2 Finally, Defendants argue that section 2725 precludes
3 Plaintiff's negligent misrepresentation claim for all bottles
4 purchased before August 31, 2002. Defendants assert that because
5 the gravamen of Plaintiff's negligent misrepresentation claim is
6 in fact to recover damages for Defendants' failure to provide
7 goods conforming to the parties' sales contracts, the limitations
8 period of section 2725 applies.

9 "To determine the statute of limitations which applies to a
10 cause of action it is necessary to identify the nature of the
11 cause of action, i.e., the 'gravamen' of the cause of action.
12 Hensler v. City of Glendale, 8 Cal. 4th 1, 22 (1994). "The nature
13 of the right sued upon and not the form of action nor the relief
14 demanded determines the applicability of the statute of
15 limitations under our code." Id. at 23 (internal quotation marks
16 and citations omitted).

17 Plaintiff argues that the gravamen of his negligent
18 representation claim is in fraud, not contract. Fraud requires,
19 in part, "knowledge of falsity (or 'scienter') [and] . . . intent
20 to defraud" Lazar, 12 Cal. 4th at 638 (internal quotation
21 marks omitted). Negligent misrepresentation, on the other hand,
22 requires, in part, a "misrepresentation of a past or existing
23 material fact, without reasonable ground for believing it to be
24 true, and with intent to induce another's reliance on the fact
25 misrepresented" Home Budget Loans, Inc. v. Jacoby &
26 Meyers Law Offices, 207 Cal. App. 3d 1277, 1285 (Ct. App. 1989).

27 The issue, then, is whether the gravamen of Plaintiff's
28

1 negligent misrepresentation claim lies in fraud or contract.
2 Defendants' have not demonstrated that Plaintiff's negligent
3 misrepresentation claim sounds in contract. To the contrary, the
4 negligent misrepresentation claim appears to be plead in
5 conjunction with or as an alternative to Plaintiff's fraud claim.

6 Defendants cite a district court case from Massachusetts in
7 support of their argument that Plaintiff's negligent
8 misrepresentation claim should be barred by section 2725. In that
9 case, however, the court based its ruling on its finding that "the
10 plaintiff [was] really trying to avoid the statute of limitations
11 on a breach of warranty claim." Wilson v. Hammer Holdings, 671 F.
12 Supp. 94, 97-98 (D. Mass. 1997). As noted above, this Court
13 interprets Plaintiff's negligent misrepresentation claim as a
14 companion claim to Plaintiff's fraud claim, and not as an end-run
15 around the limitations period for contracts. In addition, the
16 plaintiff in Wilson, unlike the Plaintiff here, had not even
17 raised a fraud claim. Id. at 95. Finally, the fact that this
18 claim arises out of the same facts that give rise to Plaintiff's
19 claims for breach of contract and breach of implied warranty does
20 not, in this Court's view, necessarily conflate the negligent
21 misrepresentation claim with the claims sounding in contract. For
22 these reasons, Defendants' Motion for Summary Judgment on this
23 issue is DENIED.

24 **b. California Business and Professions Code**
25 **Section 17200**

26 Defendants argue that they are entitled to summary judgment
27 with respect to 39 of the bottles on Plaintiff's Fourth and Fifth
28

1 Causes of Action for unlawful and fraudulent business practices
2 pursuant to Section 17200. Defendants argue that Plaintiff has
3 failed to bring his claim within the four-year statute of
4 limitations as provided for in Section 17208. Plaintiff
5 apparently concedes that his section 17200 claims for these 39
6 bottles are governed by this four-year statute of limitations but
7 argues that equitable tolling should be granted and that
8 Plaintiff's business dealings with Defendants were ongoing and the
9 section 17208 limitations period did not accrue until the date of
10 the last sale.

11 **i. Equitable Tolling**

12 Both parties cite federal law for the standard for equitable
13 tolling. The underlying statutes, however, are all California
14 laws, as are the relevant statutes of limitations. Accordingly,
15 the appropriate standard for equitable tolling is the standard
16 under California, rather than federal, law. See, e.g., Jones v.
17 Blanas, 393 F.3d 918, 927 (9th Cir. 2004) (stating that "[f]or
18 actions under 42 U.S.C. § 1983, courts apply the forum state's
19 statute of limitations for personal injury actions, along with the
20 forum state's law regarding tolling, including equitable tolling,
21 except to the extent an of these laws is inconsistent with federal
22 law"); Fink v. Shedler, 192 F.3d 911, 916 (9th Cir. 1999) (holding
23 that if equitable tolling is proper, district court should apply
24 California law because the plaintiff's claim was brought under a
25 California statute).

26 Under California law, "application of the doctrine of
27 equitable tolling requires timely notice, and lack of prejudice,
28

1 to the defendant, and reasonable and good faith conduct on the
2 part of the plaintiff." Addison v. Cal., 21 Cal. 3d 313, 319
3 (1978).

4 Plaintiff has presented evidence that he acted reasonably and
5 in good faith by relying on Defendants' assertions that the wine
6 was genuine. In addition, there are triable issues of material
7 fact regarding Plaintiff's expectation that it was not necessary
8 to have the wine independently verified after purchasing it from
9 Defendants. After all, it is likely that the very reason
10 Plaintiff engaged in business with Defendants was because he
11 believed that they were wine experts.

12 The prejudice that may be faced by Defendants is minimal.
13 Defendants concede that only 39, rather than all, of the bottles
14 are possibly barred by the limitations period of section 17208.
15 Thus, Defendants are prepared to defend on the merits for the
16 remaining bottles. It is hard to imagine how the addition of the
17 39 bottles will be overly prejudicial; the expert witnesses that
18 each side intends to call will merely be required to discuss these
19 additional bottles. Furthermore, the additional bottles in no way
20 alter the parameters of Plaintiff's legal claims.⁵

21 Finally, "the equitable tolling doctrine fosters the policy
22 of the law of this state which favors avoiding forfeitures and
23 allowing good faith litigants their day in court." Addison, 21
24 Cal. 3d at 321. Given the facts of the present case and the

25
26 ⁵ The factor of whether Plaintiff's notice was timely is
27 largely irrelevant to the present case. In any event, Defendants
28 have been on notice since the action was filed that Plaintiff's
claims involved all of the bottles.

1 policy driving California law, equitable tolling is appropriate.
2 The Court DENIES Defendants' Motion for Summary Judgment on
3 Plaintiff's Fourth and Fifth Causes of Action.⁶

4 **4. Plaintiff's Claims Against Edward and Carl Gelsman**

5 Finally, Defendants seek summary judgment with respect to
6 Plaintiff's first three causes of action against Edward and Carl
7 Gelsman. As noted above, Edward and Carl Gelsman are the sole
8 corporate officers of TWL. Edward is the president, director and
9 sole shareholder and Carl is the treasurer/secretary of TWL. The
10 Court finds that triable issues of fact exist with respect to the
11 role of both of these individuals in Plaintiff's claims for fraud,
12 constructive fraud and negligent misrepresentation. Defendants'
13 Motion for Summary Judgment on the claims against Edward and Carl
14 Gelsman is therefore DENIED.

15 **5. Authenticity of Wines at Issue**

16 The Court denied Defendants' Motion to Strike Plaintiff's
17 Expert Witness Disclosure. The Court therefore considers
18 Plaintiff's expert witness evidence in analyzing Defendants'
19 Motion for Summary Judgment. Defendants' argument that Plaintiff
20 has failed to put forth any evidence indicating that the wine
21 purchased by Plaintiff from Defendants was counterfeit is
22 therefore contradicted by Plaintiff's expert evidence.
23 Defendants' Motion for Summary Judgment on this issue is DENIED.

24
25 ⁶ The Court need not reach Plaintiff's additional argument
26 that the business dealings constituted an ongoing sales
27 transaction, rather than numerous individual sales, and that the
28 accrual date for the limitations period of section 17208 was in
fact the date of the final purchase.

1 **C. Plaintiff's Motion for Leave to Amend Complaint**

2 Plaintiff seeks leave to file an amended complaint adding
3 three new parties as defendants. These parties, Royal Wine
4 Merchants, LTD ("Royal"), Jeb Wine Trading LTD ("Jeb") and
5 Bordeaux Wine Locators, Inc. ("Bordeaux"), are allegedly wine
6 sellers who supplied Defendants with some of the wine that
7 Plaintiff alleges is counterfeit. Plaintiff further alleges that
8 recent discovery has indicated that "some of these vendors
9 actually knew that the bottles they sold Defendant[s] . . . were
10 counterfeit." Mot. for Leave at 2.

11 "In determining whether leave to amend is appropriate, the
12 district court considers the presence of any of four factors: bad
13 faith, undue delay, prejudice to the opposing party, and/or
14 futility." Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d
15 708, 712 (9th Cir. 2001) (internal quotation marks omitted).

16 Although "[t]he court should freely give leave when justice
17 so requires," Fed. R. Civ. P. 15(a)(2), the timing of the
18 Plaintiff's Motion presents a significant hurdle for Plaintiff to
19 overcome. See Schlacter-Jones v. Gen. Tel. of Cal., 936 F.2d 435,
20 443 (9th Cir. 1991) (abrogated on other grounds) (stating that the
21 "timing of the motion [for leave to amend], [filed] after the
22 parties had conducted discovery and a pending summary judgment
23 motion had been fully briefed, weighs heavily against allowing
24 leave"). This is especially true given that Defendants identified
25 at least two of these suppliers, Royal and Bordeaux, to Plaintiff
26 as early as November 29, 2006, in Defendants' Rule 26 Initial
27 Disclosure Statement. See Casey Decl. Ex. A. All three of the
28

1 suppliers were again identified to Plaintiff in Defendants'
2 Responses to Plaintiff's Special Interrogatories, served on
3 January 25, 2007. See id. Ex. B. Moreover, as early as July 11,
4 2007, Plaintiff's counsel communicated to Defendants' counsel that
5 Plaintiff was considering seeking to amend his Complaint to add
6 Royal and Jeb as defendants. See id. ¶ 6. In light of this
7 evidence, and given the advanced stage of the proceedings,
8 Plaintiff's argument that this Motion for Leave could not have
9 been filed any sooner is not persuasive.

10 In addition, contrary to Plaintiff's argument, Defendants
11 would be prejudiced if Plaintiff were permitted to add new
12 defendants. As Defendants rightly note, not only would new
13 defendants seek discovery from the current Defendants but the
14 current Defendants would also likely need to conduct their own
15 discovery. The costs and delays associated with this additional
16 discovery are not insignificant. The Court therefore finds that
17 the factors of undue delay and prejudice to Defendants weigh
18 strongly against granting leave to amend. The Court need not
19 reach the other factors and DENIES Plaintiff's Motion for Leave to
20 Amend Complaint.

21 **D. Plaintiff's Motion to Modify Current Schedule**

22 Plaintiff seeks to re-open discovery and set a new discovery
23 deadline of August 1, 2008, and move the trial, scheduled to begin
24 in just over a month on January 14, 2008, to October 6, 2008. "A
25 schedule may be modified only for good cause and with the judge's
26 consent." Fed. R. Civ. P. 16(b)(4). "Rule 16(b)'s 'good cause'
27 standard primarily considers the diligence of the party seeking
28

1 the amendment." Johnson v. Mammoth Recreations, Inc., 975 F.2d
2 604, 609 (9th Cir. 1992). "The district court may modify the
3 pretrial schedule 'if it cannot reasonably be met despite the
4 diligence of the party seeking extension.'" Id. (citing Fed. R.
5 Civ. P. 16).

6 For the reasons discussed in the previous section, Plaintiff
7 has not demonstrated good cause. Plaintiff's Motion to Modify
8 Current Schedule is therefore DENIED.

9
10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court holds the following:

- 12 1. Defendants' Motion to Strike Plaintiff's Expert
13 Witness Disclosure is DENIED.
- 14 2. Defendants' Motion for Summary Judgment is GRANTED
15 IN PART and DENIED IN PART.
- 16 3. Plaintiff's Motion for Leave to Amend Complaint is
17 DENIED.
- 18 4. Plaintiff's Motion to Modify Current Schedule is
19 DENIED.

20
21
22 IT IS SO ORDERED.

23 Dated: December 11, 2007



24 UNITED STATES DISTRICT JUDGE